Guide Davis

Dair &
Unite

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~485~~ 199

JONATHAN M. DAIR, WILLIAM F. SAUKS, JAMES DAIR, AND WILLIAM W. DAVISON, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED NOVEMBER 29, 1871.

Dec 9 1872

SUPREME COURT OF THE UNITED STATES.

No. 435.

JONATHAN M. DAIR, WILLIAM F. SAUKS, JAMES DAIR, AND WILLIAM W. DAVISON, PLAINTIFFS IN ERROR,

VS.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

INDEX.

	Original.	Print.
Filing district record	1	1

INDEX OF CASE FROM DISTRICT COURT.

Declaration	2	1
Writ	6	3
Return	7	3
Rule to plead	7	3
Davison: First and second pleas	8	4
Davison: Third and fourth pleas	9	4
Similiter	11	5
James Dair: First and second pleas	11	5
James Dair: Third and fourth pleas	12	6
Similiter	14	7
Jonathan M. Dair, plea	14	7
Demurrer to same	16	8
Joinder in demurrer	17	8
Demurrer to second, third, and fourth pleas of Davison	17	8
Joinder in demurrer	18	9
Demurrer to second, third, and fourth pleas of James Dair	18	9
Joinder in demurrer	18	9
Replication to James Dair's third plea	19	9
Similiter	20	10
Replication to Davison's third plea	20	10
Similiter	20	10
Plea of Sauks	21	10
Similiter	21	10
Trial	22	11

	Original.	Print.
Jury disagreed and discharged	23	11
Submission to court	24	12
Special finding	24	12
Judgment for James Dair and W. Davison	25	12
Writ of error to district court	28	13
Assignment of error	28	13
Joinder in error	28	14
Citation	29	14
Judgment of reversal	30	14
Case retained for trial in circuit court	30	14
Judgment for United States	31	15
Citation and service	33	16
Writ of error	34	16

1 Pleas of the circuit court of the United States for the seventh judicial circuit and district of Indiana, begun and holden at the United States court-house, in the city of Indianapolis, in the said district, on the first Tuesday in November, in the year of our Lord one thousand eight hundred and seventy, before the honorable Walter Q. Gresham, judge of the said circuit court.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
JAMES DAIR AND WILLIAM W. DAVISON, DEFENDANTS IN ERROR.
} Error to the district court of the United States for Indiana.

Filing record of dist. C.

Be it remembered, that heretofore, on the 10th day of May, A. D. 1870, the plaintiff in error, by Thomas M. Browne, esq., the attorney prosecuting the pleas of the United States, filed in said circuit court a duly-certified transcript in error to the district court of the United States for the same district, in the above-entitled cause with the assignment of errors and joinder of error annexed thereto, in the words and figures following, to wit:

2 Pleas of the district court of the United States for the district of Indiana, begun and holden at the United States court-house in the city of Indianapolis, in said district, on the first Tuesday in November, in the year of our Lord one thousand eight hundred and sixty-nine, before the honorable Walter Q. Gresham, judge of the district court of the United States for the district of Indiana.

UNITED STATES
v.
JAMES DAIR WILLIAM W. DAVISON.
} 1413. Debt on bond.

Be it remembered, that heretofore, to , on the 15th day of June, A. D. 1868, the plaintiff herein, by Alfred Kilgore, esq., her attorney, filed in the office of the clerk of said court her declaration in the cause above entitled, which is in the words and figures following, to wit:

Declaration.

The United States of America, complains of Jonathan M. Dair, William F. Sauks, James Dair, and William W. Davison, defendants of a plea that the said Jonathan M. Dair, William F. Sauks, James Dair, and William W. Davison render unto the plaintiff the sum of one hundred and fifty thousand dollars which they owe to, and unjustly detain from, the plaintiff.

3 For that whereas heretofore, to wit, at the district aforesaid, to wit, on the twenty-fifth day of June, A. D. 1866, the defendants made their certain writing obligatory, sealed with their respective seals, and bearing date a certain day and year therein inserted, to wit, the day and year aforesaid, by which the said Jonathan M. Dair and William F. Sauks, doing business under the firm-name and style of J. M. Dair & Co., to wit, at the township of Harrison, and county of Dearborn, and State of Indiana, as principals, and the said James Dair and William W. Davison as sureties, acknowledged themselves to be held and firmly bound unto the plaintiff in the full and just sum of one hundred and fifty thousand dollars, money of the United States, which

payment, well and truly to be made, said defendants thereby then and there bound themselves jointly and severally, and their joint and several heirs, executors, and administrators firmly by the writing obligatory aforesaid, to wit, at the district aforesaid.

And the said writing obligatory is subject to a condition thereunder written, to the effect following: that whereas the said J. M. Dair & Co. has made application to the collector of internal revenue for the fourth collection district of the State of Indiana for a license as distillers, in the township of Harrison, county of Dearborn, and State aforesaid: Now, therefore, if the said J. M. Dair & Co. shall truly and faithfully conform to all the provisions of an act entitled "An act to provide internal revenue to support the Government, and to pay interest
4 on the public debt," approved July 1st, 1862, and of such other act or acts as are now, or may hereafter be in this behalf enacted, then the above obligation to be void and of no effect, otherwise, it shall abide and remain in full force and virtue.

And the plaintiff, by Alfred Kilgore, the attorney of the United States for the district of Indiana, gives the court now here to understand and be informed that the said Jonathan M. Dair and William F. Sauks, under the firm-name of J. M. Dair & Co. as aforesaid, two of said defendants, and the principals in said writing obligatory, on and after the said twenty-fifth day of June, A. D. 1866, to wit, at the township of Harrison, in the county of Dearborn, to wit, in the district aforesaid, undertook, and thenceforward for a long space of time, to wit, up to the first day of May, A. D. 1867, carried on, and were engaged in the business of distillers within the said fourth collection district of the State of Indiana, and that the said firm of J. M. Dair & Co., composed as aforesaid, did not truly and faithfully conform to all the provisions of the act entitled "An act to provide internal revenue to support the Government, and to pay interest on the public debt," approved July 1, 1862, and of such act and acts as were then and thereafter in this behalf enacted; but on the contrary thereof they, the said firm of J. M. Dair & Co., on the said twenty-fifth day of June, A. D. 1866, and on divers other days
5 and times from and after the day last named, and up to the first day of May, A. D. 1867, violated, and wholly disregarded the provisions of said act of Congress, and of other acts in that behalf thereafter enacted, and the obligations of the said writing obligatory, in this, to wit:

That heretofore, to wit, on the 20th day of August, A. D. 1866, at the district aforesaid, said Jonathan M. Dair and William F. Sauks under the firm-name of J. M. Dair & Co. as aforesaid, as such distillers so engaged in the business of distilling spirits as aforesaid, had before that time manufactured at said district, a large quantity, to wit: five thousand proof-gallons of distilled spirits, to wit, whiskey, and did then and there remove the said distilled spirits from the place where the same were distilled, otherwise than into a bonded warehouse as provided by law, contrary to the form of the statutes of the United States in such case made and provided, whereby and by reason whereof the said Jonathan M. Dair and William F. Sauks under the firm-name of J. M. Dair & Co. as aforesaid, became, and then and there were liable to pay to the plaintiff an assessment and tax on said distilled spirits of two dollars for each and every gallon thereof, to wit, the sum of ten thousand dollars, which said assessment and tax remains due and wholly unpaid.

Whereby, and by means of said several premises, the conditions
6 of said writing obligatory became, and were broken and an action accrued to the plaintiff to have and demand of said defendants said sum of one hundred and fifty thousand dollars above demanded.

Yet said defendants, although often requested so to do, have not, nor has either of them, as yet paid the said sum of one hundred and fifty thousand dollars above demanded or any part thereof to the said plaintiff, but to pay the same have hitherto wholly refused and still refuse, to the damage of the said plaintiff of one hundred and fifty thousand dollars, and hence this suit is brought.

A. KILGORE, *U. S. Attorney.*

And thereupon was issued out of the office of the clerk of said court a summons in the above-entitled cause in the words and figures following, to wit:

Summons.

The President of the United States of America to the marshal of the district of Indiana, greeting:

You are hereby commanded to summons Jonathan M. Dair, William F. Sauks, James Dair, and William W. Davison, if they may be found in your district, to be and appear before the district court of the United States of America, for the district of Indiana, to be holden at Indianapolis on the first Tuesday in November next, then and there to
7 answer unto the United States, in an action of debt on bond.

And this you will not omit under the penalty of one hundred dollars; and have you then and there this writ.

Witness David McDonald, judge of the district court of the United States for the district of Indiana and the seal of said court, at Indianapolis, this 15th day of June, in the year of our Lord one thousand eight hundred and sixty-eight.

[SEAL.] J. D. HOWLAND, *Clerk.*

And afterwards, to wit, on the 8th day of October, A. D. 1868, said summons was returned into the office of the clerk aforesaid with the following return endorsed thereon.

Return.

SEPT. 17. I served the within summons as commanded by reading same to Jonathan M. Dair, and by reading to, and copy left with, James Dair, William F. Sauks, and William W. Davison.

BEN. SPOONER, *U. S. Marshal,*
By JOHN C. SPOONER, *Deputy.*

And afterwards, to wit, at the November term of said court on the 18th day of November, A. D. 1868, before the honorable David McDonald, judge of said court, the following proceedings in the above-entitled cause were had, to wit:

Rule.

Now comes Mr. Kilgore, the attorney for the Government, and
8 upon his motion the defendants are ruled to plead by the 2d day of December next.

And afterwards, to wit, at the November term aforesaid of said court on the 30th day of November, A. D. 1868, before the Honorable David

McDonald, jndge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Now come the defendants, William Davison and James Dair, by Mr McDonald, their attorney, and file their pleas herein in the words and figures following:

Plea 1 of Davison.

And now comes the said defendant, William W. Davison, one of the above-named defendants, and defends against this action, and for cause of defense says, that the said supposed writing obligatory, alleged in plaintiffs' declaration, is not his bond, and of this he puts himself upon the country.

Plea 2 of Davison.

And for a further plea the said defendant, William W. Davison, says that it is untrue that said Jonathan M. Dair did remove five thousand proof-gallons of spirits from the place where the same were distilled otherwise than into a bonded warehouse, as provided by law, as set forth and described in plaintiffs' declaration, and that it is untrue that there is due to the plaintiff the sum of ten thousand dollars for taxes unpaid upon spirits distilled and unlawfully removed by the said Jonathan M. Dair, but on the contrary this defendant doth aver that
9 the number of gallons of distilled spirits unlawfully removed by said Jonathan M. Dair is less than is set forth and described in plaintiffs' declaration, and of this he puts himself upon the country.

Plea 3 of Davison.

And for a further plea this defendant says he ought not to be charged with said debt by virtue of said supposed writing obligatory, because he says that said supposed writing obligatory was by this defendant signed when the same was in blank as to the names of the obligor upon the condition that Joseph P. Cloud should also sign the same as a joint obligor with this defendant, and that said supposed writing obligatory thus signed was left with the said Jonathan M. Dair as his escrow to be by him delivered to plaintiffs' agent in case the same was so afterwards executed by Joseph P. Cloud, and not otherwise; that the Joseph P. Cloud never did sign said supposed writing obligatory, and the same never was delivered as a valid bond of this defendant whereby the said writing of this defendant so signed upon the condition aforesaid became and was wholly annulled and vacated, and so this defendant says said writing obligatory is not his deed, and of this he puts himself upon the country.

Plea 4 of Davison.

And for a further plea the said defendant, William W. Davison, says that he ought not to be charged with said debt by virtue of the
10 said supposed writing obligatory, because he says that he signed and sealed said writing obligatory while the same was in blank as to the names of the obligors; that the names of the obligors were not then signed to said supposed writing obligatory, and that this defendant signed the same at the request of Jonathan M. Dair, upon the assurance and agreement of said Dair that the said supposed writing

obligatory should also be signed and sealed by one Joseph P. Cloud as a joint obligor with this defendant, and that the same should not be delivered as a bond until the same was signed and sealed by said Cloud so named as aforesaid. This defendant says the name of Joseph P. Cloud was not obtained to said supposed writing obligatory, and that this defendant would not have signed said supposed writing obligatory without being assured upon the condition that the signature of said Cloud should be obtained to and placed upon said bond or supposed writing obligatory as a joint obligor before the same was delivered as a valid bond, and this this defendant is ready to verify, whereupon he prays judgment if he ought to be charged with said debt by virtue of said supposed writing obligatory, and of this he puts himself upon the country.

L. H. BOND and
McDONALD, ROACHE AND McDONALD,
Attorneys for the Defendant.

11 THE UNITED STATES OF AMERICA,
Southern District of Ohio:

William W. Davison, being first duly sworn according to law, *and* deposes and says that the statements made in the foregoing pleas are true.

WILLIAM W. DAVISON.

Sworn to before me and subscribed in my presence this 27th day of November, 1868.

H. H. LEAVETT,
Dist. Judge U. S. for Southern Dis. of Ohio.

And the plaintiff, as to the first plea of the said defendant in this behalf above pleaded, now comes and doth the like.

THOMAS M. BROWNE,
U. S. Att'y.

Plea 1 of Ja's Dair.

And now comes the said James Dair, one of the above-named defendants, and defends against the action, and for cause of defense, says that the supposed writing obligatory alleged in plaintiffs' declaration is not his bond, and of this he puts himself on the country.

Plea 2 of Ja's Dair.

And for a further plea the said defendant, James Dair, says that it is untrue that the said Jonathan M. Dair did remove five thousand proof-gallons of spirits from the place where the same were distilled, otherwise than into a bonded warehouse as provided by law, as set forth and described in plaintiffs' declaration; and that it is untrue that there is due to plaintiffs the sum of ten thousand dollars for taxes unpaid
12 upon spirits distilled and unlawfully removed by the said Jonathan M. Dair; but, on the contrary, this defendant doth aver that the number of gallons of distilled spirits unlawfully removed by the said Jonathan M. Dair is less than is set forth and described in plaintiffs' declaration, and the amount of taxes unpaid upon distilled spirits unlawfully removed by said Jonathan M. Dair is less than is set forth and described in plaintiffs' declaration; and of this he puts himself upon the country.

Plea 3 of Dair.

And for a further plea this defendant says he ought not to be charged with said debt by virtue of said supposed writing obligatory, was by this defendant signed when the same was in blank as to the names of the obligors, upon the condition that Joseph P. Cloud should also sign the same as a joint obligor with this defendant, and that said supposed writing obligatory thus signed was left with the said Jonathan M. Dair as an escrow to be by him delivered to plaintiffs' agent in case the same was so afterwards signed and executed by Joseph P. Cloud, and not otherwise; that said Joseph P. Cloud never did sign said supposed writing obligatory, and the same never was delivered as a valid bond of this defendant, whereby the said writing of this defendant so signed upon the condition aforesaid, became and was wholly annulled and vacated, and so this defendant says said supposed writing obligatory is not his deed; and of this he puts himself upon the country.

13 *Plea 4 of Ja's Dair.*

And for a further plea the said defendant, James Dair, says that he ought not to be charged with said debt by virtue of the said supposed writing obligatory, because he says that he signed and sealed said writing obligatory while the same was in blank as to the names of the obligors; that the names of the obligors were not then signed to said supposed writing, and that this defendant signed the same at the request of Jonathan M. Dair, upon the assurance and agreement of said Dair that the said supposed writing obligatory should also be signed and sealed by one Joseph P. Cloud as a joint obligor with this defendant, and that the same should not be delivered as a bond until the same was signed and sealed by said Cloud so named as aforesaid. This defendant says the name of Joseph P. Cloud was not obtained to said supposed writing obligatory, and that this defendant would not have signed said supposed writing obligatory without being assured, upon the condition that the signature of said Cloud should be obtained to and placed upon said bond or supposed writing obligatory as a joint obligor before the same was delivered as a valid bond, and this this defendant is ready to verify: Whereupon he prays judgment if he ought to be charged with said debt by virtue of said supposed writing obligatory; and of this he puts himself upon the country.

L. H. BOND, and
McDONALD, ROACHE AND McDONALD,
Att'ys for Defendants.

14 THE UNITED STATES OF AMERICA,
South. District of Ohio:

James Dair, being first duly sworn, according to law, deposes and says that the statement' made in the foregoing pleas are true.

JAMES DAIR.

Sworn to before me and subscribed in my presence this 27th day of November, 1868.

H. H. LEAVETT,
Dist. Judge U. S. South. Dist. of Ohio.

Similiter.

And the plaintiff, as to the first plea of the defendant in this behalf above pleaded, doth the like.

THOMAS M. BROWNE,
U. S. Dist. Att'y.

And afterwards, to wit, at the November term of said court, on the 11th day of December, A. D. 1868, before the Honorable David McDonald, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Now comes the United States, by Mr. Kilgore, the district attorney; and comes also of said defendants, Jonathan M. Dair, and files his seperate plea in bar, in the words following:

Plea of J. M. Dair.

And now comes the said Jonathan M. Dair, one of the above-named defendants, and defends against the action, and for cause of defense, says that it is untrue that he did remove five thousand proof-gallons of distilled spirits, to wit, whisky, from the place where the same
15 were distilled otherwise than into a bonded warehouse, as provided by law, as set forth and described in plaintiffs' declaration; and that it is untrue that there is due to plaintiff from the defendant the sum of ten thousand dollars for taxes unpaid upon spirits distilled by the said Dair, as set forth and described in plaintiffs' declaration; but, on the contrary, this defendant doth aver that the number of gallons of distilled spirits unlawfully removed by the said Jonathan M. Dair is less than is set forth and described in plaintiffs' declaration, and that the amount of taxes unpaid upon spirits unlawfully removed by him is less than is set forth and described in said declaration; and of this he puts himself upon the country.

L. H. BOND, and
McDONALD, ROACH AND McDONALD,
Att'ys for Defendants.

THE UNITED STATES OF AMERICA,
Southern District of Ohio:

Jonathan M. Dair, one of the defendants above-named, being by me first duly sworn, deposes and says that the statements made in the foregoing answer are true.

JONATHAN M. DAIR.

Sworn to before me and subscribed in my presence the 8th day of January, 1868.

H. H. LEAVETT,
Dist. Judge U. S. South. Dist. of Ohio.

And afterwards, to wit, at the November term aforesaid of said court, on the 30th day of December, A. D. 1868, before the Honorable
16 David McDonald, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Now comes Mr. Kilgore, attorney for the United States, and for said defendants Mr. Joseph E. McDonald, and upon affidavit filed, and motion, the defendants have leave to take deposition' herein at any time

before the 5th day of January next, on proper notice, and subject to all just exceptions.

And afterwards, to wit, at the November term aforesaid of said court, on the 6th day, A. D. 1869, before the honorable David McDonald, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now Mr. Kilgore for the United States, and comes also said defendants, and, by agreement of parties, it is ordered that both parties may take depositions at Harrison, Ohio, on the 12th day of the present month.

And afterwards, to wit, at the November term aforesaid of said court, on the 8th day of January, A. D. 1869, before the honorable David McDonald, judge of said court, the following further proceedings in the above-entitled cause were had, to wit.

Comes now the United States by Alfred Kilgore, esq., district attorney, and the defendants by counsel come also, and thereupon the plaintiff files a demurrer to the plea of Jonathan M. Dair, as follows, to wit

Demurrer to plea of J. M. Dair.

And the plaintiff by A. Kilgore, her attorney, comes, and as to the plea of the said Jonathan M. Dair, above pleaded, says that she
17 should not be barred or preclude her from having and maintaining her aforesaid action against him; therefore she prays judgment and her debt, &c.

And for special cause of demurrer she says:

1. That said plea is bad and insufficient, because the same is double.

2. That the same is not a good plea, either by way of *havuse*, or by way of confession and avoidance, but is a mixture of both.

3. That said plea in so far as it contains any denials of matters in the declaration contained is bad, and insufficient in law, because said denials are severally negatives pregnant.

4. Said plea is in other respects informal and insufficient in law; wherefore he prays judgment.

A. KILGORE, *U. S. Att'y.*

Joinder.

And the said Dair files his joinder in demurrer, and the said plaintiff files a seperate demurrer to the 2d, 3d, and 4th pleas of said William W. Davison, as follows:

Dem. to the 2d, 3d, & 4th pleas of Davison.

And the plaintiff, by Kilgore, her attorney, comes, and as to each of the said 2d, 3d, and 4th pleas of the said William W. Davison, one of said defendants, by him above pleaded, and the matters and things in the same stated and set forth, says that the same are severally insufficient in law to bar or preclude her from having or maintaining her aforesaid action thereof against William W. Davison, and that the plaintiff is not bound by law to answer the same, and this she is ready to veri-
18 fy. Wherefore she prays judgment, and her debt and damages, &c.

A. KILGORE, *U. S. Att'y.*

Joinder.

And the said Davison files his joinder in demurrer, and the plaintiff also files a seperate demurrer to the 2d, 3d, and 4th pleas of the said James Dair, as follows:

Demurrer to 2d, 3d, 4th pleas of James Dair.

And the said plaintiff, by Kilgore, her attorney, comes, and as to each of the said 2d, 3d, and 4th pleas of the said James Dair, by him above pleaded, says that each of the same, and the matters in each of the same stated and set forth, are not sufficient in law to bar or preclude her, the said plaintiff, from having and maintaining her aforesaid action thereof against the said James Dair, and the said plaintiff is not bound by *by* law to answer the same, and this she is ready to verify. Wherefore she prays judgment, and her debt aforesaid, together with her damages by her sustained on occasion of the detention thereof, to be adjudged to her, &c.

A. KILGORE, *U. S. Att'y.*

And the said Dair files his joinder in demurrer.

And afterwards, to wit, at the November term aforesaid of said court, on the 22d day of January, A. D. 1869, before the Honorable David McDonald, judge of said court, the following further preceedings in the above-entitled cause were had, to wit:

Ordered, that the cause above entitled be continued.

And afterwards, to wit, at the May term, aforesaid, on the 12th day of May, A. D. 1869, before the Honorable David McDonald, judge of said court, the following further proceedings in the above-entitled
19 cause were had, to wit:

Replication to 3d plea of Ja's Dair.

Comes now Thomas M. Browne, esq., attorney prosecuting the pleas of the United States in this behalf, and files his replication to the 3d plea of the defendant James Dair, in the words following:

And the said plaintiff, by Thomas M. Browne, her attorney, comes, and for replication to the 3d plea of the said defendant, James Dair, above pleaded to her declaration herein says that she should not be barred or precluded from having or maintaining her aforesaid action against him, because she says it is not true in manner and form as in said plea stated that said writing obligatory was by said defendant signed when it was in blank as to the names of the obligors, or upon condition that Joseph P. Cloud should also sign the same as a joint obligor with the said defendants, or that the said writing obligatory, when so signed, was left with Jonathan M. Dair as an escrow to be delivered by him to the said plaintiffs' agent in case, and upon agreement, that said Joseph P. Cloud should sign and execute the same as a joint obligor, or that the same should not be delivered as a bond until the same was so signed; but the truth is that said defendant did make, execute, and deliver the said writing obligatory to the said plaintiff in manner and form as she has above thereof complained against him, and this she prays may be enquired of by the court.

THOMAS M. BROWNE,
U. S. Dist. Att'y.

20 *Similiter.*

And the defendant doth the like.

And at the same time files his replication to the 3d plea of the defendant, William W. Davison, in the words following:

Replication to 3d plea of Davison.

And the said plaintiff, by Thomas M. Browne, her attorney, comes, and for replication to the 3d plea of the said defendant, William W. Davison, above pleaded to her declaration herein, says that she should not be barred or precluded from having or maintaining her aforesaid action thereof against him, because she says that it is not true, in manner and form as in plea stated that the said writing obligatory was by the said defendant signed, when the same was in blank, as to the names of the obligors, or upon condition that Joseph P. Cloud should sign the same as a joint obligor with the said defendants, or that the said writing obligatory, when so signed, was left with the said Jonathan M. Dair as an escrow to be delivered by him to the plaintiffs' agent, upon condition that the said Joseph P. Cloud should execute the same, and nor otherwise; but the truth is that said defendant did make, execute, and deliver the said writing obligatory to the said plaintiff in manner and form as she has above thereof complained against him, and this she prays may be enquired of by the country, &c.

THOMAS M. BROWNE, *U. S. Att'y.*

Similiter.

And the defendant doth the like.

21 And afterwards, to wit, at the May term aforesaid of said court, on the 14th day of May, A. D. 1869, before the Honorable David McDonald, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, William F. Sauks, and files his plea herein in the words following:

Plea of Sauks.

Comes now William F. Sauks, and, for a seperate plea in this behalf, says that the conditions of the said writing obligatory were not broken, in manner and form as the plaintiff hath above complained, because he says that it is not true that the said Jonathan M. Dair and the said defendant Sauks, at the time when, &c., distilled as such distillers five thousand proof-gallons of distilled spirit called whiskey, or any other quantity or number of gallons, and then and there or at any other time or place, removed the said distilled spirits, or any other quantity of such spirits, from the place where the same were distilled other than into a bonded warehouse, as provided by law. And of this he puts himself upon the country, &c.

BOND, McDONALD, ROACHE AND McDONALD,
Att'ys for Defendants.

Similiter.

And the United States doth the like.

T. M. BROWNE,
Dis. Att'y.

And afterwards, to wit, at the May term aforesaid of said court, on the 1st day of June, A. D. 1869, before the Honorable David
22 McDonald, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now Thomas M. Browne, esq., attorney, prosecuting the pleas of the United States, and the defendants come also, by counsel, and upon their agreement the above cause is continued.

And afterwards, to wit, at the November term of said court, on the 17th day of December, A. D. 1869, before the honorable Walter Q. Gresham, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Trial.

Comes now Thomas M. Browne, esq., attorney, prosecuting the pleas of the United States, and comes also the defendants, Sauks, Dair, and Davison, by Mr. McDonald, their attorney, and the cause coming on for the assessment of damages herein against the defendant Jonathan M. Dair and for the trial of the issues joined between the Government and the other said defendants here, comes a jury, to wit, Thomas Tyner, George W. Williamson, J. W. C. Shultz, J. W. Reid, John Crum, Joseph C. Jewell, Hilary Clay, Malcolm A. Lowes, A. D. Rose, John W. Witt, Thomas A. Harbin, and T. W. Thomas, who, being duly sworn to assess the damages and try the issues joined as aforesaid, and having heard the evidence and a part of the argument, are, by consent of parties and leave of the court, permitted to seperate until the calling of the cause on Tuesday morning next.

23 And afterwards, to wit, at the November term aforesaid of said court, on the 21st day of December, A. D. 1869, before the Honorable Walter Q. Gresham, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now Thomas M. Browne, esq., attorney, prosecuting the pleas of the United States, and the defendants also come by counsel, and the jury, having heard the residue of the argument, retire to the jury-room.

And afterwards, to wit, at the November term aforesaid of said court, on the 22d day of December, A. D. 1869, before the Honorable Walter Q. Gresham, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now Thomas M. Browne, esq., attorney, prosecuting the pleas of the United States. And the defendants, by counsel, come also.

Jury disagree & are disch'd.

And the jury, now reporting that it is impossible for them to agree, are, by order of the court and consent of the parties, discharged from the further consideration of this cause.

And afterwards, to wit, at the November term aforesaid of said court, on the 3d day of March, A. D. 1870, before the Honorable Walter Q. Gresham, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Submission to court.

24 Comes now Thomas M. Browne, esq., attorney, prosecuting the pleas of the United States. And the defendants, by Mr. McDonald, their attorney, also come, and, by their agreement in writing, this cause is submitted to the court for trial and determination without a jury.

And afterwards, to wit, at the November term aforesaid of said court, on the 4th day of March, A. D. 1870, before the Honorable Walter Q. Gresham, judge of said court, the following further proceedings in the cause above entitled were had, to wit:

Special finding.

Comes now Thomas M. Browne, esq., attorney for the United States, and the defendants, Jonathan M. Dair, William F. Sauks, James Dair, and William W. Davison come also by Mess. McDonald and McDonald, their attorneys, and the court having heard the evidence under the submission in writing heretofore made, the court doth find for the plaintiff as against the said defendants Jonathan M. Dair and William F. Sauks, and doth assess the amount of *the amount of* the debt against them upon said bond in the sum of eight thousand dollars, ($8,000.) And upon the issue joined between the plaintiff and the defendants, James Dair and William W. Davison, the court doth find specially the facts following, to wit: That said James Dair and William W. Davison signed said writing obligatory, upon the day of its date, as sureties, at the instance of Jonathan M. Dair, one of the principals, but that it was signed by them upon the condition that said writing obligatory
25 was not to be delivered to the plaintiff until it should be executed by one Joseph P. Cloud, as co-surety; that said writing obligatory upon its signing by them upon the condition aforesaid was placed in the hands of said principal, Jonathan M. Dair, who afterwards, without the peformance of that condition, and without the consent of said James Dair and William W. Davison, delivered the same to the plaintiff. And the court doth further find that when the bond was so delivered it was in all respects regular upon its face, and the plaintiff had no notice of the condition.

Judgment in favor of Dair, Ja's, & Davison, W'm, and ag'st Dair, Jonathan, & Sauks, W'm.

And, upon the special finding aforesaid, the plaintiff, by its attorney, moves the court for judgment against said defendants, James Dair and William W. Davison, which motion the court now overrules, and finds for the said James Dair and William W. Davison upon the issues given aforesaid. It is the therefore considered that the plaintiff recover of the said defendants, Jonathan M. Dair and William F. Sauks, the said sum of eight thousand dollars, ($8,000,) together with the costs herein, taxed as $.

And it is further considered that said defendants, James Dair and William W. Davison, as to this suit, do go hence without day.

26 UNITED STATES OF AMERICA,
District of Indiana, ss:

Certificate.

I, J. D. Howland, clerk of the district court of the United States in and for the district aforesaid, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record and proceedings in the cause above entitled.

In testimony whereof I do hereunto set my hand and the seal of said court, at Indianapolis, in said district, on this 1st day of May, A. D. 1870.

[SEAL.] J D. HOWLAND, *Clerk.*

Writ of error to dis. C. Ja's Dair. W. Davison.

UNITED STATES, *ss:*

The President of the United States to the judge of the district court of the United States for the district of Indiana, greeting:

Because, in the record and proceedings, as also in the rendition of a judg , in a plea which is in the said district court before you, between The *the* United States and James Dair and William Davison, manifest error hath happened to the great damage of the United
27 States, as by its complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are truly commanded, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the circuit court of the United States for the same district, together with this writ, so that you hand the same in said court, at Indianapolis, on the 3d day of May, 1870, that the record and proceedings aforesaid being inspected, the said circuit court may cause further to be done therein to correct that error what of right and the law and custom of the United States should be done.

Witness the Honorable Walter Q. Gresham, judge of said district court, and its seal this 1st day of May, 1870.

[SEAL.] J. D. HOWLAND, *Clerk.*

28 *Assignment of error.*

UNITED STATES *v.* JONATHAN M. DAIR, WILLIAM F. SAUKS, James Dair, William W. Davison.	Error from the U. S. district court.

Now comes Thomas M. Browne, the att'y of the United States, prosecuting the pleas thereof in this behalf, and sets forth and shows to the court now here, that there are manifest errors in the records and proceedings, and in the rendition of judgment in the cause above entitled, and he specially sets forth and show' for error:

1st. That upon the facts specially found by the court, and by the law of land thereon, the judgment herein ought to have been in favor of the United States, and against the said James Dair and William W. Davison, the appelelees, and not for the said appellors.

Wherefore, on behalf the U. S., he prays a reversal of said judgement.

THO'S M. BROWNE,
U. S. Att'y, Pl'f in Error.

Joinder.

In nothing is there error.

J. E. McDONALD,
For the Defendants—Error.

29 *Citation.*

United States of America to James Dair, William W. Davison, greeting:

You are hereby cited and admonished to be and appear at a circuit court of the United States in and for 7th judicial circuit & district of Indiana, to be held at Indianapolis on the 1st Tuesday of May, 1870, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the same district, wherein the United States is plaintiff, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error should not be credited, and speedy justice should not be done to the parties in that behalf.

W. Q. GRESHAM,
District Judge.

I acknowledge service.
May 1st, 1870.

McDONALD & McDONALD.
Attorneys for Defendants in error.

30 And afterwards, to wit, at the May term of said court, on the 28th day of May, A. D. 1870, before the Honorable David Davis, one of the judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

Judgment of reversal.

Comes now Thomas M. Browne, esq., attorney prosecuting the pleas of the United States, and come also the defendants to said writ of error, and this cause is now submitted and argued by counsel, and deliberation being had, and the court being sufficiently advised, it is considered that the judgment of the district court herein be in all things reversed, and a new trial is ordered.

And it is further considered that the plaintiff in error recover of said defendants in error the costs in the proceeding in the court below, taxed at $. . And also the costs in error.

Cause retained for trial in cir. C.

And it is ordered herein that this cause be retained for final trial and determination in this court.

And afterwards, to wit, at the November term of said court, on the 14th day of December, A. D. 1870, before the Honorable Walter Q.

Gresham, one of the judges of said court, the following further proceedings in the above entitled cause were had, to wit:

Come now the parties, by their respective attorneys, and thereupon this cause is submitted to the court for final determination upon the facts stated in the record, according to the written agreement
31 herein filed, which is in the words and figures following, to wit:

The parties, by counsel, submit this cause upon the evidence in the record of the district court to this court for final trial and determination, without the intervention of a jury.

J. E. McDONALD,
Att'ys for Defendant.
THO'S M. BROWNE,
U. S. Attorney.

And afterwards, to wit, at the November term of said court, on the 29th day of December, A. D. 1870, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Judg't for U. S.

Comes now Thomas M. Browne, esq., attorney prosecuting the pleas of the United States, and the defendants, by Messrs. McDonald and McDonald, their attorney', also comes. And the court being sufficiently advised in the premises, doth find for the United States, and assess the amount of damages at the sum of eight thousand dollars, ($8,0000.) It is therefore considered by the court that the plaintiff do recover of the defendants the said sum of eight thousand dollars, ($8,000,) together with its costs herein, taxed at $, and also the costs in the district court.

And thereupon the said defendants Jonathan M. Dair, William F. Sauks, James Dair, and William W. Davison, pray their appeal
32 to the Supreme Court of the United States, which is allowed upon their filing the proper appeal bond in the penalty of $1,600, with surety to be approved by the court.

And afterwards, to wit, at the November term aforesaid, on the 30th day of December, A. D. 1870, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the defendants, by counsel, and file their appeal bond herein, with Joseph P. Cloud and George W. Keen as sureties; which is approved by the court.

Cert.

UNITED STATES OF AMERICA,
District of Indiana:

I, John D. Howland, clerk of the circuit court of the United States for the district of Indiana, do hereby certify that the foregoing is a full, true, and complete record of the proceedings and judgment in the above-entitled cause as fully as the same remain of record in my office.

Witness my hand and the seal of said court this 11th day of January, 1871.

J. D. HOWLAND, *Clerk.*

33 *Writ of error to C. C.*

UNITED STATES OF AMERICA, *ss:*

To the United States of America, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Indiana, wherein Jonathan M. Dair, William F. Sauks, James Dair, and William W. Davidson are plaintiffs, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness Hon. Walter Q. Gresham, the judge of said circuit court, this 30th day of December, 1870.

W. Q. GRESHAM.

Service of this writ acknowledged Dec. 30, 1870.

THO. M. BROWNE,
U. S. District Att'y for Indiana.

34 *Citation.*

UNITED STATES OF AMERICA:

The President of the United States to the judges of the circuit court of the United States for the 7th judicial circuit and district of Indiana, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea, which is in the said circuit court before you, between Jonathan M. Dair, William F. Sauks, James Dair, and William W. Davison, and the United States of America, a manifest error hath happened, to the great damage of the said Jonathan M. Dair, William F. Sauks, James Dair, and William W. Davison, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the
35 same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on day of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable S. P. Chase, Chief Justice of the said Supreme Court of the United States, this thirtieth day of December, the year of our Lord one thousand eight hundred and seventy, and of the independence of the United States the ninety-fifth, and the seal of said circuit court.

[SEAL.] J. D. HOWLAND, *Clerk.*

(Indorsement on cover:) No. 435. Jonathan M. Dair, W'm F. Sauks, James Dair, and W'm W. Davison, plaintiffs in error, vs. The United States. Indiana C. C. U. S. Filed 29th November, 1871.



Supreme Court of the United States.

JONATHAN M. DAIR ET AL,

v.

THE UNITED STATES.

Error to the Circuit Court of the United States for the District of Indiana.

BRIEF BY McDONALD & BUTLER,

Attorneys for Plaintiffs in Error.

SUPREME COURT of the UNITED STATES.

JONATHAN M. DAIR *et al*

v.

THE UNITED STATES:

Error to the Circuit Court of the United States for the District of Indiana.

BRIEF FOR PLAINTIFFS IN ERROR.

This action was commenced in the District Court of the United States for the District of Indiana, on a destiller's bond, for the November term, 1868. Jonathan M. Dair and William F. Sanks were sued as principals on the bond, and James Dair and William W. David son as sureties.

The sureties plead specially that the bond was executed by them as an *es crow*, and was delivered without their consent and without the performance of the conditions upon which it was signed. The cause was tried at the November term, 1869, of said court on the issues joined between the United States and William F. Sanks, James Dair and William W. Davidson, and being unable to agree the jury was discharged. It also appears that the jury were at the same time sworn to assess the damages against the said Jonathan M. Dair, although it does not appear that any default had been entered against him.

After the jury was discharged it appears from the record on page 12, that the cause was submitted to the court upon an agreement in writing, and that a special finding was made by the court which is set out in the record on same page. On this special finding the court rendered judgment against Jonathan M. Dair and James F. Sanks, the principals for the sum of $8,000, and at the same time rendered judgment for James Dair and William W. Davidson. A writ of error was prosecuted by the United States from the Circuit Court, and such proceedings were had in that court that at the May term, 1870, the judgment of the District Court was reversed and the cause retained in the Circuit Court for final trial. At the final trial in the Circuit Court the cause was heard by the court, a jury being waived, on the facts embraced in the record being the facts stated in the special finding of the Judge of the District Court, and judgment was therein rendered against all of the defendants for the sum of $8,000. A writ of error was duly sued out of this court directed to the Circuit Court, and the cause now stands for hearing on the same in this court. The record so far as it shows a prayer for appeal is a clerical error, and being surplusage can have no effect on the status of the cause.

The proceedings, as they appear in the printed record, are by no means regular, and suggest that there have been some omissions, not intentional on the part of the clerk in making out the transcript. The main question in the cause arises upon the special defences set up by the sureties and the facts found therein by the District Judge as embraced in his special findings. The special findings support the special pleas, and are to the effect following: "That James Dair and William W. Davidson signed the said writing "obligatory upon the day of its date as sureties at the instance of "Jonathan M. Dair, one of the principals, but that it was signed "by them upon the condition that said writing obligatory was not "to be delivered to the plaintiff until it should be executed by one "Joseph P. Cloud as co-surety. That said writing, upon its being "signed by them upon the conditions aforesaid, was placed in the "hands of said principal, Jonathan M. Dair, who afterwards, without the performance of the condition and without the consent of "said James Dair and William W. Davidson, delivered the same "to plaintiff. And the court further found that when said "bond was so delivered it was in all respects regular on its face, "and that the plaintiff had no notice of the condition." See

page 12 of the record. Now the decision of the Circuit Court reversing the judgment of the District Court made upon the facts found as above stated was erroneous, unless the said James Dair and William W. Davidson were bound by the delivery of the bond without the performance of the condition upon which they signed it.

The authorities upon the point of law involved in the facts found by the District Court are by no means uniform, and we shall not make any effort to reconcile them, nor shall we attempt to cite those which stand opposed to the view taken of the law in the defences made for the sureties.

This Court, in the case of *Pawling et al* v. *the United States*. 4 Cranch, 219, held that parol evidence might be introduced to establish the fact that a bond which on its face purported to have been delivered, absolutely, had been delivered in violation of the conditions upon which it had been signed, by some of the parties, and that if such defence should be made out, it was sufficient to defeat the suit on this bond as to those who had signed it thus conditionally.

The facts offered to be proven in that case were not so strong or pointed as the facts found in this, and if they were proper in that case then the decision in this case should be reversed.

The whole question in regard to the effect of parol conditions annexed to the signing of instruments of this kind as precedent to the delivery of the instrument, is very fully discussed by Chief Justice Denio in the case of the *People* v. *Bostwick et al*, 32 New York, 445, and the view taken by the defendants in error in this case fully sustained. In the last case above cited, most of the leading cases on both sides of the question are cited, and the questions are treated upon the legal principles involved, as well as in the light of adjudicated cases, and such conclusions are reached by the learned Judge as make it impossible to disregard them without a departure from well established propositions of law relating to the execution of such instruments.

It is an axiom of the law that a bond speaks from the time of its delivery, and it makes no difference how perfect it may be in form unless it has actually been delivered it is no bond. To constitute a delivery it must pass out of the hands of the obligors with their consent, and must be received by the obligee or his agent in that behalf, for the purpose for which it was intended. That the obligors must part with the possession of it with intent that it

shall be binding upon them, and until their assent is obtained it is not possible to bind them by any possession that may have been obtained of the instrument. That when they have signed it upon conditions and left it in the hands of another to be held until the conditions are complied with, his possession is their possession, and as to the instrument in question he is but a special agent, and if the obligee receive the bond of such agent without the conditions being complied with he is no more protected in the rights he may claim under it than any other person who deals with an agent outside of his authority. That the fact that the obligee did not know of such conditions cannot make any difference, he knew he was dealing with an agent and was therefore bound to know, at his peril, the extent of the authority of that agent. Nor does the fact that the agent was one of the signers of the bond, make any difference, for the obligee was bound to know that he could only act as a principal for himself.

These questions have been ruled both ways in the State of Indiana, and it may be said that at the present time the law is not settled in that State. In the case of the *State* v. *Pepper*, 22 Ind., the doctrine as above stated was fully recognized. And subsequently in a case between the same parties it was held that to defeat the effect of the actual delivery the knowledge of such conditions must be brought home to the obligee, or at least that the names of the parties whose signatures were yet to be procured must appear in the body of the bond. This modification cannot be supported on principle. It must be an outrage on the doctrine of agency to say that one who had possession of an instrument for a specific purpose was the general agent of those whose names were signed to it, and that although he might have acted against his specific instructions in that case he was still within the scope of his employment. Whatever agency he had in the premises was connected with the instrument and had relation to his acts connected with it, and was therefore special. All persons dealing with him in regard to it must be bound by the extent of that authority, whaatever it was, and could not be protected by their actual want of knowledge.

It may be hard for one who finds a bailee in the full possession of personal property which he has hired of the owner for a particular purpose, and buys it, to have to give it up on the demand of the owner, but still it is the law that having no right to sell it the

bailee could make no title to it as against the owner, and he who purchased it was bound to see that the vendor had a right to sell it.

We might extend our argument and cite authorities to almost any length; but we do not deem it necessary, for until this court has determined to overrule the case of Pawling et al v. the United States, *supra*, it will not be able to sustain the ruling of the Circuit Court in setting aside and reversing the judgment of the District Court. As additional authorities in support of the case of Pawling, we cite *Lovett* v. *Adams*, 3 Wend. 380; *Fletcher* v. *Austin*, 11 Vt., 447; *Johnson* v. *Butler*, 4 Barn & Ald., 440; *The State Bank* v. *Evans*, 3 Green (N. J.) 155; *Bibb* v. *Reed*, 3 Ala. 38.

With these authorities we submit the case, and respectfully ask that it be reversed.

J. E. McDonald,
Jno. M. Butler,
Att'ys for Plaintiffs in Error.

In the Supreme Court of the United States.

DECEMBER TERM, 1872.

JONATHAN M. DAIR AND OTHERS
vs.
THE UNITED STATES.
} No. 199.

In error to the Circuit Court of the United States for the District of Indiana.

BRIEF FOR THE UNITED STATES.



In the Supreme Court of the United States.

DECEMBER TERM, 1872.

JONATHAN M. DAIR AND OTHERS
vs.
THE UNITED STATES.
No. 199.

In error to the Circuit Court of the United States for the District of Indiana.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Debt on a distiller's bond executed by Jonathan M. Dair and William F. Sauks, as principals, and by James Dair and William W. Davison as sureties, conditioned that the said principals "shall truly and faithfully conform to all the provisions of" the act of July 1, 1862, and all such act or other acts that are now, or may hereafter be, in this behalf enacted.

The defendants pleaded separately.

In the district court judgment was rendered for the Government against Jonathan M. Dair and Sauks, from which no writ of error was sued out. (Record, pp. 12, 13.)

James Dair and Davison pleaded, (their pleas being similar:)

1. *Non est factum;* upon which issue was joined.
2. The second plea is immaterial.
3. "And for a further plea this defendant says he ought not to be charged with said debt by virtue of

said supposed writing obligatory, because he says said supposed writing obligatory was by this defendant signed when the same was in blank as to the names of the obligors, upon the condition that Jos. P. Cloud should also sign the same as a joint obligor with this defendant, and that said supposed writing obligatory thus signed was left with the said Jonathan M. Dair as an escrow to be by him delivered to plaintiffs' agent in case the same was so afterwards executed by Joseph P. Cloud, and not otherwise; that Joseph P. Cloud never did sign said supposed writing obligatory, and the same never was delivered as a valid bond of this defendant, whereby the said writing of this defendant so signed upon the condition aforesaid became and was wholly annulled and vacated, and so this defendant says said writing obligatory is not his deed, and of this he puts himself upon the country.

4. "And for a further plea the said defendant, William W. Davison, says that he ought not to be charged with said debt by virtue of the said supposed writing obligatory, because he says that he signed and sealed said writing obligatory while the same was in blank as to the names of the obligors; that the names of the obligors were not then signed to said supposed writing obligatory, and that this defendant signed the same at the request of Jonathan M. Dair, upon the assurance and agreement of said Dair that the said supposed writing obligatory should also be signed and sealed by one Joseph P. Cloud as a joint obligor with this defendant, and that the same should not be delivered as a bond until the same was signed and sealed by said Cloud so named as aforesaid. This defendant says the name of Joseph P. Cloud was not obtained to said supposed writing obligatory, and that this defendant would not have signed said supposed writing obligatory without being assured upon the condition that the signature of said Cloud should be obtained to and placed upon said bond or supposed writing obligatory as a joint obligor before the same was delivered as a valid bond, and this this defendant is ready to verify; whereupon he prays judgment if he ought to be charged with

said debt by virtue of said supposed writing obligatory, and of this he puts himself upon the country."

Demurrer and joinder in demurrer to each plea.

The case was tried in the district court without a jury; and upon the issue between the plaintiffs and James Dair and Davison there was the following special finding:

"The court doth find specially the facts following, to wit: That said James Dair and William W. Davison signed said writing obligatory upon the day of its date, as sureties, at the instance of Jonathan M. Dair, one of the principals, but that it was signed by them upon the condition that said writing obligatory was not to be delivered to the plaintiff until it should be executed by one Joseph P. Cloud, as co-surety; that said writing obligatory upon its signing by them upon the condition aforesaid, was placed in the hands of said principal, Jonathan Dair, who, afterwards, without the performance of that condition, and without the consent of said James Dair and William W. Davison, delivered the same to the plaintiff. And the court doth further find that when the bond was so delivered it was in all respects regular upon its face, and the plaintiff had no notice of the condition."

Upon this finding the district court gave judgment for the defendants, and the case was removed by writ of error to the circuit court; the plaintiffs in error assigning as error—

"That upon the facts specially found by the court and by the law of the land thereon, the judgment herein ought to have been in favor of the United States, and against the said James Dair and William W. Davison."

In the circuit court the judgment of the district court was reversed, and judgment was given for the United States, and the case was brought here by writ of error.

ARGUMENT.

The special finding of the court shows that the principals delivered to the Government a bond in all respects regular upon its face, but that the sureties signed it and delivered it to the principals upon a condition (of which the plaintiffs had no notice whatever) that it was not to be delivered until executed also by Joseph P. Cloud, as a co-surety.

The case, therefore, falls within the recent and well-considered decision of the supreme court of Maine, that a bond, perfect upon its face, apparently duly executed by all whose names appear thereto, purporting to be signed and delivered, and actually delivered without a stipulation, cannot be avoided by the sureties upon the ground that they signed it on a condition that it should not be delivered unless it was executed by other persons who did not execute it—where it appears that the obligee had no notice of such condition, and there was nothing to put him upon inquiry as to the manner of its execution, and that he had been induced upon the faith of such bond to act to his own prejudice.

State *vs.* Peck, 53 Maine, 284.

This rests upon the well-known doctrine of estoppel *in pais*, stated by Lord Denman, "that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

Pickard *vs.* Sears, 6 Ad. & El., 474.

This statement is generally recognized as law.

Freeman *vs.* Cook, 2 Exch., 664.

Swayne *vs.* Seamans, 9 Wallace, 273, 274.

Audenried *vs.* Betteley, 5 Allen, 384.

See, also, Pendleton County *vs.* Amy, 13 Wallace, 305, and cases cited.

In this case, J. M. Dair was the agent of the sureties for the purpose of delivering the bond, and the case falls within the principle that a principal is responsible for the fraud or misconduct of his agent; "for," says Lord Holt, "seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger."

Hern *vs.* Nichols, 1 Salk., 289.

See, also, brief in Davison *vs.* United States, No. 13, on the present docket.

C. H. HILL,
Asst. Attorney General.